(3)

No. 91-542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., Warden, et al.,

Petitioner,

vs.

FRANK ROBERT WEST, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court grant collateral relief merely because it disagrees with the good faith, reasonable decision of the state courts on a "mixed question," i.e. the application of an established legal standard to the undisputed historical facts.

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. Both parties have consented in writing to the filing of this brief.

The present case involves the extended relitigation of a claim already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

In December 1978, Angelo Cardova was the victim of a burglary in which numerous items were taken. Pet. Cert. App. 2.[2] On January 10, during a consensual search of Frank West's home, police found a substantial portion of the stolen items. *Id.*, at 2-3. To connect West with the theft, the prosecution relied solely on Virginia's common law permissive inference that unexplained possession of recently stolen goods justifies a conclusion that the possessor is the thief. *Id.*, at 4.[3]

West challenged the sufficiency of the evidence by a motion at the end of the prosecution's case. *Id.*, at 5. He then testified and denied stealing the items. "His testimony was somewhat confused and he was unable to account for how he acquired some of the merchandise." *Id.*, at 3-4. His further challenges to the sufficiency of the evidence at trial, on appeal, and on state habeas corpus were rejected. *Id.*, at 5.

West then filed a habeas corpus petition in federal district court. Applying *Jackson* v. *Virginia*, 443 U. S. 307 (1979), the district court rejected his challenge to the sufficiency of the evidence. Pet. Cert. App. 27-28.

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2. These facts are taken from the Court of Appeals' opinion.

3. This Court has expressly approved essentially the same inference in a federal criminal prosecution. "Possession of the fruits of the crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." *Wilson* v. *United States*, 162 U. S. 613, 619 (1896).

A panel of the Court of Appeals for the Fourth Circuit reversed, holding that the evidence was not sufficient to convince any reasonable trier of fact. *Id.*, at 19-20. The court acknowledged it was disagreeing with the unanimous determination of a "properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge." *Id.*, at 20. The full Fourth Circuit split evenly over whether to grant rehearing en banc. Pet. Cert. 7.

SUMMARY OF ARGUMENT

A claim under *Jackson* v. *Virginia* is either a factual question or a "mixed question of law and fact." The rule that mixed questions are subject to *de novo* review on habeas corpus is based on premises which were flawed to begin with and which have eroded further over time. *Stone* v. *Powell*, *Miller* v. *Fenton*, and *Teague* v. *Lane* in combination require a reexamination of this rule.

De novo review of mixed questions should be reserved for truly fundamental claims, such as coerced confession, mob domination of trials, and denial of counsel. Other claims, including sufficiency of the evidence, should not be relitigated if the state courts have fairly reached a conclusion on which reasonable judges can differ.

ARGUMENT

I. The same standard of review does not necessarily apply to all "mixed questions."

A. Mixed Questions.

A strong argument can be made that sufficiency of the evidence is a factual determination and therefore deference is required under 28 U. S. C. § 2254(d). See *Jackson* v. *Virginia*, 443 U. S. 307, 336 (1979) (Stevens, J., concurring in the judgment). The *Jackson* majority seems to have rejected that argument, however, and announced a standard calling upon

the federal habeas court to make an independent evaluation of the sufficiency of the evidence. *Id.*, at 324. If the question is not a factual one, it must be a so-called "mixed question."

In 1953, Justice Frankfurter stated in a *concurring* opinion that federal courts had a duty to review questions of federal constitutional law *de novo* on federal habeas corpus. *Brown* v. *Allen*, 344 U. S. 443, 500-501 (1953). The majority opinion, when read carefully, tells us just the opposite. The rule of *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924), permitting discretionary deference to a prior adjudication by a federal court, applies equally to a prior adjudication by a state court. *Brown*, 344 U. S., at 463.

Despite its contradiction of the majority's holding, Justice Frankfurter's exposition has generally been followed as if it were the law. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 422 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Justice Frankfurter's thesis that the *de novo* review rule extends to "mixed questions," *Brown*, *supra*, 344 U. S., at 507, has also been followed. See, *e.g.*, *Townsend* v. *Sain*, 372 U. S. 293, 318 (1963).

Defining "mixed questions," whether in habeas corpus or on direct appeal, has proven no easy task. This Court has described the problem as "elusive," *Miller* v. *Fenton*, 474 U. S. 104, 113 (1985), and "vexing," *Pullman-Standard* v. *Swint*, 456 U. S. 273, 288 (1982). "Mixed questions" are typically defined as those "which require the application of a legal standard to the historical fact determinations." *Sain*, *supra*, 372 U. S., at 309, n. 6. Yet it is elementary that this statement does not really set a clear standard for separating law from fact. Negligence is the most common example. Deciding whether defendant's specific conduct was "reasonable" falls squarely within *Sain*'s definition of "mixed question," yet that determination has always been assigned to the jury as a question of "fact." Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 232, n. 22 (1985).

The jury bias cases illustrate that the standard of review on mixed questions has been confused. *Reynolds* v. *United States*, 98 U. S. 145 (1879) established a policy of great deference to the trial judge. "The question thus presented is one of mixed law and fact," *id.*, at 156, yet a reviewing court should not reverse "unless the error is manifest," *ibid.* In *Irvin* v. *Dowd*, 366 U. S. 717 (1961), a case involving intense publicity of the crime, the Court noted *Reynolds*' "manifest error" test, yet it held that on habeas corpus review of this mixed question, the federal court must exercise its independent judgment, relying on Justice Frankfurter's statement from *Brown* v. *Allen*. See *Irvin*, 366 U. S., at 723.

Patton v. *Yount*, 467 U. S. 1025 (1984), another pretrial publicity case, applied a presumption of correctness to the trial court's determination of the bias of individual jurors. *Yount* unconvincingly distinguishes *Irvin* as a case involving the bias of the jury as a whole. *Id.*, at 1036. *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985) followed *Yount* for the determination of bias on the basis of opposition to capital punishment.

The confusion and inconsistencies have not escaped scholarly criticism. Professor Monaghan notes two sources of confusion.

> "First, courts assume that the properly affixed characterization [as 'law' or 'fact'] necessarily determines which legal actor is assigned the decisionmaking task. Second, the two categories have been used to describe at least *three* distinct functions: law declaration, fact identification, and law application." Monaghan, *supra*, 85 Colum. L. Rev., at 234.

The third category, law application, is not a "mixture" at all, but rather an entirely distinct function. *Id.*, at 237. Given specific historical facts and a broadly worded "test," do the facts meet the test? Attempts to assign this function to the category of "law" or "fact" are doomed to failure because they ask the wrong question. If a round peg must be pounded into one of two holes, one square and the other triangular, it will never fit.

Professor Monaghan asserted that the "real issue is not analytic, but allocative: what decisionmaker should decide the issue?" *Ibid.* In *Miller*, *supra*, this Court agreed. Casting aside the facade, the *Miller* Court frankly admitted that "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." 474 U. S., at 114.

B. Allocation and Decision Makers.

Once the question is recognized as allocative rather than analytical, a problem with the labeling approach becomes apparent. Our complex adjudicative machinery has many different kinds of decisionmakers. There are administrative tribunals, juries, state trial judges, federal trial judges, state appellate courts, federal appellate courts, and the United States Supreme Court.[4] Can the simple labeling of an issue as "law," "fact," or "mixed question" really properly allocate the decision among so many different actors? Amicus submits that it cannot.

Monaghan discusses in detail the distinction between "judicial control of the administrative state and appellate review of the decisions of inferior tribunals." Monaghan, *supra*, 85 Colum. L. Rev., at 247-263. The classification of issues for the purpose of allocating decisions between Article III courts and administrative bodies is based on different concerns from those which are involved in the allocation between trial and appellate courts in a unitary system. *Id.*, at 262-263.

Professor Monaghan does not discuss federal habeas corpus in detail as a separate category, but the decisions of this Court indicate that still different concerns are involved in the

4. This Court is *sui generis* because it is the only court with appellate jurisdiction over both state and federal courts. See 28 U. S. C. §§ 1254, 1257.

allocation of decisions between the state courts and the lower federal courts, as opposed to the allocation on direct review. *Stone* v. *Powell*, 428 U. S. 465 (1976) made clear that questions open for Supreme Court review on direct appeal from state courts are not necessarily open to collateral review on federal habeas corpus.

C. Stone v. Powell.

Mapp v. *Ohio*, 367 U. S. 643, 660 (1961) held that the admission in a state criminal trial of evidence seized in violation of the Fourth Amendment is a federal constitutional error. There is no other jurisdictional basis for imposing the rule on the states. The *Mapp* rule is either constitutional or it is wrong.[5] The *Powell* Court refers to "a judicially created remedy rather than a personal constitutional right," 428 U. S., at 494, n. 37, but the remedy must be a constitutionally required one for a federal court to have jurisdiction to consider it. Compare *ibid.* (jurisdiction) with *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 209-210, 110 S. Ct. 2822, 2830 (1990) (habeas jurisdiction limited to federal questions).

Notwithstanding the constitutional nature of the rule, *Powell* held that full federal review was not a foregone conclusion. Particular categories of constitutional claims are open to individual examination. 428 U. S., at 478-479.

Fourth Amendment cases frequently involve so-called "mixed questions" or what Monaghan more accurately calls "law application." See *ante* p. 5. A comparison of Monaghan's definition of that category with this Court's description of the "probable cause" inquiry is instructive. "[L]aw application is situation specific; any ad hoc norm elaboration is, in

5. A strong argument has been made that the legislative branch could supplant the exclusionary rule with an alternate remedy. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 411 (Burger, C. J., dissenting). Our point here is that *Mapp*, if it is correct, is a constitutional rule at least in the absence of such an alternate remedy.

theory, like a ticket good for a specific trip only." Monaghan, *supra*, 85 Colum. L. Rev., at 236. "[P]robable cause is a fluid concept — turning on the assessment of probabilities in a particular factual context — not readily, or even usefully, reduced to a neat set of legal rules." *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983). "There are so many variables in the probable-cause equation that one determination will seldom be useful 'precedent' for another." *Id.*, at 238, n. 11. A *Gates* probable cause inquiry thus fits precisely its Monaghan's "law application" category. By forbidding relitigation on habeas corpus, see *Powell*, *supra*, 428 U. S., at 481-482, the *Powell* Court decided to allocate the exclusionary rule decision to the state courts as opposed to the federal habeas courts.

Supreme Court direct review of state Fourth Amendment law application, by contrast, is either *de novo* or a much milder form of deference. In *Minnesota* v. *Olson*, 109 L. Ed. 2d 85, 96, 110 S. Ct. 1684, 1690 (1990), this Court deferred to a state court's "fact-specific application of the proper legal standard." See also *id.*, at 96-97 (Kennedy, J., concurring). Yet two months later in *Alabama* v. *White*, 110 L. Ed. 2d 301, 310, 110 S. Ct. 2412, 2417 (1990), this Court reversed a state appellate court in a "close case." The difference appears to be that in *White* the Court believed that further elaboration of the norm was needed. Compare *id.*, at 307 with Monaghan, *supra*, 85 Colum. L. Rev., at 237, 273.

The bottom line, then, is that state courts generally are trusted with the application of Fourth Amendment law to specific factual situations. The Supreme Court on direct appeal has the discretion to review this law application *de novo*, but this discretion will generally only be exercised when it is necessary to clarify the law, and not merely for error correction. The federal habeas courts are limited to ensuring that the state courts provide the opportunity for full and fair litigation of the claim. As a matter of the sound administration of justice, to use *Miller*'s words, it is better to leave these decisions to the state courts.

II. Recent developments have undermined the basis for *de novo* review of "mixed questions."

At least until *Miller* v. *Fenton*, 474 U. S. 104 (1985), determinations of whether a question of law application (other than the exclusionary rule) would be reviewed *de novo* on habeas corpus were made on the basis of the fact/law distinction. That is, if an issue was determined to be a "mixed question" then it was to be decided *de novo*, on the theory that such questions were the same, for this purpose, as questions of pure law. See, *e.g.*, *Townsend* v. *Sain*, 372 U. S. 293, 313, n. 9, 318 (1963).

If questions of pure law are not reviewed *de novo*, however, then the logical foundation for *de novo* review of mixed questions is removed. It becomes a tail without a dog, a grin without a cat.

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), as further expounded in *Butler* v. *McKellar*, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990), has effectively changed the rule on "pure law" questions from one of *de novo* consideration to one of oversight to correct judicial disobedience. A rule is "new" under *Teague/Butler* if the outcome is "susceptible to debate among reasonable minds." *Butler*, 108 L. Ed. 2d, at 356, 110 S. Ct., at 1217. *Butler* "limits federal courts' habeas corpus function to reviewing state courts' legal analysis under the equivalent of a 'clearly erroneous' standard of review." *Id.*, 108 L. Ed. 2d, at 361, 110 S. Ct., at 1221 (Brennan, J., dissenting).

Indeed, Justice Brennan went so far as to conclude that the question presented in this case had already been decided in *Butler*.

> "A federal court may no longer consider the merits of the petitioner's claim based on its best interpretation *and application* of the law prevailing at the time her conviction became final; rather, it must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." *Ibid.* (emphasis added).

This statement is correct unless the rule being applied falls within one of the two *Teague* exceptions. The first is for categorical exemptions from punishment. See *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This exception is clearly inapplicable to the present case. The second is for "watershed" rules. *Teague*, *supra*, 489 U. S., at 311.

The second exception has yet to find an actual application. See *Butler*, *supra*, 108 L. Ed. 2d, at 357, 110 S. Ct., at 1218; *Saffle* v. *Parks*, 108 L. Ed. 2d 415, 429, 110 S. Ct. 1257, 1264 (1990); *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 212-213, 110 S. Ct. 2822, 2832-2833 (1990). There may never be one. Criminal procedure jurisprudence is sufficiently developed that there may be no fundamental procedural rights remaining to "emerge." See *Teague*, *supra*, 489 U. S., at 313. Justice Harlan advanced this exception in 1971, when *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) was only eight years old, apparently to explain his continuing concurrence in the retroactive application of *Gideon* on collateral review. See *Mackey* v. *United States*, 401 U. S. 667, 694 (1971).[6]

The existence of the second exception does mark a significant milestone in the development of habeas corpus theory, however. *Teague* converges with *Miller* v. *Fenton* and *Stone* v. *Powell* at this point in recognition that not all claims of constitutional error are equal. In 1953, when Justice Frankfurter penned his famous concurrence in *Brown* v. *Allen*, "fundamental" error and "constitutional" error were virtually synonymous, at least in cases involving state prisoners. See *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), overruled in *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969). Seventeen years later, a distinguished jurist referred to the body of constitutional decisions in this area as "a detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155-156 (1970) (footnote omitted). Finally, in 1982 Justice Stevens said outright what many observers had known for some time. A great many constitutional claims are *not* fundamental. The assumption that all constitutional claims merit *de novo* collateral review needs to be reexamined. *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (dissent).

6. Collateral attack via *Gideon* persisted for many years due to the widespread use of pre-*Gideon* priors for impeachment and sentencing. See *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967).

Teague recognized through its second exception that truly fundamental claims require different treatment. *Miller* v. *Fenton* recognizes that the classification of "mixed questions" is often a policy decision rather than an analytical exercise. 474 U. S., at 113-115. *Stone* v. *Powell* recognizes that the exclusionary rule is too far removed from core constitutional rights to justify collateral review where state remedies are adequate. 428 U. S., at 494-495. In short, "claims of constitutional error are not fungible." *Lundy*, *supra*, 455 U. S., at 543 (dissent).

If *de novo* review of a mixed question on habeas corpus survives *Teague* and *Butler*, it must do so on some basis other than the discredited notion that all questions of "law" are reviewed *de novo*. That basis, amicus submits, can be found in the overlapping categories of *Teague*'s "watershed rules," the *Lundy* dissent's "fundamental" claims, and *Miller*'s "half century of unwavering precedent" rationale. See *Miller*, *supra*, 474 U. S., at 115.

The claims which require the extraordinary precaution of *de novo* collateral review are, by and large, the claims which historically led this Court to expand habeas corpus beyond jurisdictional issues into other constitutional questions. They include coerced confessions, *Leyra* v. *Denno*, 347 U. S. 556, 561-562 (1954); mob dominated trials, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923); knowing use of perjured testimony, *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935); systematic exclusion of minorities from jury service, *Brown* v. *Allen*, 344 U. S. 443, 470 (1953); and complete denial of counsel, *Johnson* v. *Zerbst*, 304 U. S. 458, 467 (1938). See *Lundy*, *supra*, 455 U. S., at 544, nn. 9-11 (dissent); *Teague*, *supra*, 489 U. S., at 313-314.

It is no accident that all of these cases predate the criminal procedure revolution of the 1960's. With the exception of *Gideon*, all of the truly fundamental rules had been made directly under the Due Process Clause, without the need for the incorporation doctrine.

Applied to the present case, we find a federal rule which is both fundamental and long-standing that a defendant cannot, consistently with due process, be convicted on *no* evidence. *Thompson* v. *Louisville*, 362 U. S. 199, 206 (1960); see also *Crumpton* v. *United States*, 138 U. S. 361, 362-363 (1891). The standard of *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979) is of much more recent vintage. That is not to say that the rule is wrong or undesirable. States often have similar rules on direct appeal. See, *e.g.*, 6 B. Witkin & N. Epstein, *California Criminal Law* §§ 3205, 3208 (2d ed. 1989). As the *Jackson* concurrence points out, however, there is no history of abuse demonstrating a pressing need for more intensive federal scrutiny. 443 U. S., at 329-330 (Stevens, J.). The state courts are competent to adjudicate challenges to the sufficiency of evidence.

In resolving the exhaustion issue in the present case, the Fourth Circuit held that the state courts had already decided the sufficiency of the evidence question adversely to West. See App. Pet. Cert. 8-9. The question presented is whether the simple disagreement by a panel of the federal appellate court with the reasonable, considered judgment of the coequal state judiciary on a question within the latter's jurisdiction is sufficient ground for collateral attack on a final judgment.

Absent any special reason for *de novo* federal review, amicus submits that disagreement is not sufficient reason. Amicus further submits that there is no special reason applicable to this case. If the state courts have fairly considered the claim and reached a conclusion within the bounds in which reasonable judges can differ, that conclusion should not be disturbed. Certiorari should be granted to clarify the standard of review for "mixed question" cases on federal habeas corpus in the post-*Teague* era.

III. *Estelle* v. *McGuire* may affect the disposition of the petition in this case.

On October 9, this Court heard oral argument in another case involving a federal court granting habeas relief on the basis of disagreement with a state evidentiary decision. *Estelle* v. *McGuire*, No. 90-1074. See also *McGuire* v. *Estelle*, 902 F. 2d 749 (CA9 1990); *McGuire* v. *Estelle*, 919 F. 2d 578 (CA9 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

Depending on how *McGuire* is decided, that case may involve principles of habeas corpus law that have a significant impact on the present case. Therefore, amicus suggests that it may be prudent to defer the disposition of the present petition until *McGuire* is decided.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October, 1991

Respectfully submitted,

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